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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF MONTEREY COUNTY, Respondent, FILEMON SUAREZ ARIAS, Real Party in Interest.	H041705 (Monterey County Super. Ct. No. SS132389)

I. INTRODUCTION

Defendant Filemon Suarez Arias has been charged with committing 15 felony sex offenses involving his stepgranddaughter Jane Doe, who was six to fourteen years old at the time of the alleged offenses. In the course of pretrial discovery, defendant issued a subpoena duces tecum to "Catholic Charities Seaside" (hereafter, Catholic Charities) for Jane Doe's counseling records. The People filed a motion to quash the subpoena duces tecum on the ground that pretrial discovery of Jane Doe's counseling records would violate the psychotherapist-patient privilege (Evid. Code, § 1014) and her constitutional right to privacy, as set forth in the California Constitution, Article I, section 1, and in the

California Victim's Bill of Rights (Cal. Const., Art. I, § 28 subd. (b)(4)), known as "Marsy's Law." The trial court denied the motion to quash the subpoena duces tecum, conducted an in camera review of Jane Doe's Catholic Charities counseling records, and ordered disclosure of a redacted portion of the records subject to a protective order.

The People filed a petition for writ of mandate seeking extraordinary relief from the trial court's order denying the motion to quash the subpoena duces tecum. Following the guidance of the California Supreme Court in *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*) and *People v. Gurule* (2002) 28 Cal.4th 557 (*Gurule*), we determine that under the circumstances of this case defendant has not demonstrated that his due process right to a fair trial requires pretrial disclosure of Jane Doe's Catholic Charities counseling records, which he concedes are privileged under the psychotherapy-patient privilege.

We will therefore issue a peremptory writ of mandate vacating the trial court's order denying the motion to quash the subpoena duces tecum and direct the trial court to enter a new order granting the motion. Our decision in the instant writ proceeding is without prejudice to reissuance of the subpoena duces tecum at the time of trial. We emphasize that we express no opinion regarding the merits of any further trial court proceedings that may take place at the time of trial with regard to the disclosure of Jane Doe's Catholic Charities counseling records or the application of Marsy's Law.

II. FACTUAL BACKGROUND

Our summary of the facts is taken from the testimony given at the preliminary hearing held on December 6, 2013.

Defendant is the stepgrandfather of Jane Doe. When Jane Doe was six years old, she and her mother visited her grandmother and defendant at their home once or twice a week. During their visits, defendant would take Jane Doe into another room, usually his bedroom, and tell her that he was going to teach her to play the guitar. While they were in the bedroom together, defendant would play a pornographic videotape and rub Jane Doe's back. He would also touch her breasts and outer vaginal area.

Defendant continued to touch Jane Doe while playing a pornographic videotape during her subsequent visits to his home. When Jane Doe was seven years old, defendant also began to touch her vaginal area under her underwear. At age eight, Jane Doe began wearing a bra and defendant touched her breast area. Defendant also touched Jane Doe's vaginal area during a hide-and-seek game. On one occasion, when Jane Doe was wearing a dress, defendant had her spread her legs apart and put his mouth on her vaginal area.

On another occasion, defendant asked Jane Doe to touch his exposed penis, but she refused. When she was nine years old, defendant began putting his fingers inside her vaginal area. At age 10, defendant had Jane Doe get on her knees while he put his finger in her anus, which hurt her.

The last time that defendant put his mouth on Jane Doe's vaginal area occurred when she was 11 years old. At that time, Jane Doe started having menstrual periods and whenever defendant tried to touch her, she told him she was "on her period." The final physical contact between defendant and Jane Doe took place in defendant's home in September 2013, when Jane Doe was 14 years old. The September 2013 incident involved defendant rubbing Jane Doe's leg, and asking her to make sounds similar to what was heard on the pornographic videotapes.

Defendant told Jane Doe not to report what he had done and not to tell her mother or grandmother about it because if she did, they would be in trouble and she would have to go to foster care. For that reason, Jane Doe did not tell anyone about defendant's conduct until she told her therapist, who, as a mandated reporter, contacted the police. Jane Doe was seeing a therapist because she had "attempted suicide once and she ha[d] started cutting herself." She told a police officer that she had originally attempted suicide because of the incidents involving defendant, believing that "if she wasn't around it couldn't happen to her anymore and that she wouldn't be in trouble." She cut herself because the pain was a "stress reliever."

III. PROCEDURAL BACKGROUND

A. *The Charged Offenses*

Following the preliminary hearing held on December 6, 2013, an information was filed that charged defendant with 15 felony offenses, including one count of sexual penetration of a child aged 10 or younger on or between December 16, 2007 through December 15, 2009 (Pen. Code, § 288.7, subd. (b)[1]; count 1), 12 counts of lewd or lascivious act on a child under 14 on or between December 16, 2005 through December 15, 2010 (§ 288, subd. (a); counts 2-13), one count of lewd conduct on a child age 14 on or between September 1, 2013 through September 30, 2013 (§ 288, subd. (c)(1); count 14), and one count of oral copulation with another person under 16 years of age on or between December 16, 2010 through December 15, 2011 (§ 288a, subd. (b)(2); count 16.)[2]

B. *The Motion to Quash*

Several months after the December 2013 preliminary hearing, defendant issued a pretrial subpoena duces tecum to Catholic Charities. The subpoena duces tecum included a Monterey County Superior Court hearing date of August 13, 2014, and directed Catholic Charities to send to the court copies of the following items: "All notes, records, narratives & documents of [Jane Doe's] counseling sessions."

On August 8, 2014, the district attorney filed a motion to quash the subpoena duces tecum. The grounds for the motion to quash included the psychotherapist-patient privilege (Evid. Code, § 1010 et seq.), which the district attorney argued required defendant to make a showing of good cause at the time of trial before the trial court could conduct an in camera review of psychotherapy records. The district attorney also argued that pretrial discovery of Jane Doe's psychotherapy records would violate her

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The information lacks a count 15.

constitutional right to privacy, as set forth in the California Constitution, Article I, section 1, and in the California Victim's Bill of Rights (Cal. Const., Art. I, § 28 subd. (b)(4)), known as "Marsy's Law."[3]

As evidentiary support for the motion to quash, the district attorney submitted the declaration of María Ascensión Runciman, who stated, among other things, that she is a licensed clinical social worker and director of mental health counseling at Catholic Charities. Runciman also stated that she could not confirm that Jane Doe had been seen for counseling at Catholic Charities because that would violate Jane Doe's confidentiality. However, Runciman asserted that "[i]f Jane Doe did come for counseling she would have been [seen] by a sexual assault counselor as defined in Evidence [C]ode section 1035.2 and/or a Psychotherapist as defined in Evidence Code section 1010. [¶] . . . As such any communication would be privileged and I am required to claim such privilege."

In opposition to the motion to quash, defendant argued that the district attorney had failed to show that Jane Doe's counselor, Misty Peterson, a " 'mental health intern,' " met the statutory definition of "psychotherapist" (Evid. Code, § 1010, subds. (f), (o), (p)). Defendant further argued that even if Jane Doe's counseling records were privileged under the psychotherapist-patient privilege, he had shown good cause for pretrial disclosure of any records documenting Jane Doe's statements to Catholic Charities

[3] California Constitution, article I, section 28, subd. (b)(4) provides: "In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: [¶] . . . [¶] . . . To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law."

personnel, including records that were "relevant to the issue of adolescent memory and suggestibility" and the counselor's methods of questioning.

According to defendant, his constitutional rights to confrontation and due process (U.S. Const., 5th, 6th & 14th Amends.) required disclosure of Jane Doe's counseling records, even if privileged, in order to ensure his right to a fair trial. Defendant maintained that the trial court was obligated to hold an in camera hearing and to disclose those documents that were material to the defense on the issues of adolescent memory and suggestibility and the mental and emotional state of the witness.

The district attorney's reply included a second declaration of Runciman. In her second declaration, Runciman stated that Peterson was a a graduate student enrolled in a master of social work program at California State University, Monterey Bay, who had delivered counseling/therapy under Runciman's supervision at Catholic Charities from August 28, 2013 to May 6, 2014. Runciman also stated that it was her understanding that Peterson met the statutory criteria for a clinical counselor trainee under Business and Professions Code section 4999.12, subdivision (g). (See Evid. Code, § 1010.)[4]

C. *The Trial Court's Orders*

1. Denial of the Motion to Quash Subpoena Duces Tecum

A hearing on the motion to quash the subpoena duces tecum was held on September 19, 2014. At the outset, the prosecutor conceded that Jane Doe's initial disclosure of defendant's conduct, which had led to the charges against defendant, was made to Peterson on November 22, 2013, who then made a police report. The trial court

[4] The Evidence Code section 1010 definition of a psychotherapist, for purposes of the psychotherapist-patient privilege, includes a "clinical counselor trainee, as defined in subdivision (g) of Section 4999.12 of the Business and Professions Code, who is fulfilling his or her supervised practicum . . . and is supervised by . . . a licensed clinical social worker . . . ." (Evid. Code, § 1010, subd. (p).)

found that Peterson met the statutory definition of a clinical counselor trainee (Bus. & Prof. Code, § 4999.12, subd. (g)).

Defense counsel argued that defendant was entitled to pretrial disclosure of Jane Doe's counseling records because it was defendant's position that Jane Doe had fabricated the allegations of child molestation, possibly under the influence of the counseling intern. Defense counsel further argued that defendant was entitled to pretrial disclosure of relevant information after the trial court's in camera review because disclosure would help to resolve the case, would indicate any need for additional investigation, and would provide impeachment material.

The prosecutor advised the trial court that the police report "laid out" the circumstances of Jane Doe's initial disclosure to Peterson, which included Jane Doe telling Peterson that she was afraid of seeing defendant at an upcoming family event because defendant had molested her and had said he was going to have sex with her when she was older.[5] Peterson then reported Jane Doe's disclosure to the police because she was instructed to do so by her supervisor.

At the trial court's request, the parties provided the court with an excerpt of the police report that showed "the context of how the police report was generated, both from the context of the report by Ms. Peterson, [and] also the follow-up by the alleged victim." Having reviewed the police report excerpt, the trial court ruled that "given that the initial disclosure was made on November 22nd, 2013, to Ms. Peterson, I believe balancing the rights of the defendant to have adequate trial preparation and everything connected with his defense and the Marsy's Law rights of the victim to not have the records disclosed, I think that the Court still, under the circumstances, should review the records in camera

[5] The police report was not included in the record.

before I make a decision as to whether or not those would be provided to Counsel or anyone else."

The trial court then denied the motion to quash and set a September 2014 hearing date for the court's in camera review.

2. Order After In Camera Review

During the hearing held on September 25, 2014, the trial court stated its findings that defendant had shown good cause for the subpoena duces tecum and for pretrial disclosure of a portion of Jane Doe's Catholic Charities counseling records. Specifically, the court found that "the Defense's right to have the information, constitutional right to have this information now, to prepare an adequate defense, has been shown for the initial disclosure made by the victim to the therapist."

The trial court advised the parties that the court had numbered the counseling records pages 1 through 22. Then court then ordered disclosure of specific pages with redactions. Page 2 and 3 were to be disclosed with Jane Doe's personal information redacted. Page 9 was to be disclosed and redacted "to include only the dates and number of visits, the name of the counselor, the signatures of the counselor and her supervisor, and the discharge primary diagnosis." The second paragraph of the discharge summary that referenced Jane Doe's initial report was to be disclosed, with the remainder of the document to be redacted. Page 13 was to be provided without redaction.

The trial court also ordered the undisclosed counseling records to remain under seal, and asked the prosecutor to prepare a protective order. The court stated that the redacted counseling records would be disclosed after an appropriate protective order was signed. A hearing date to review the protective order was set in October 2014.

After setting the October 2014 hearing date to review the protective order, the trial court set an earlier hearing date of September 30, 2014, "for further hearing as to the applicability of confidentiality provisions of [Penal Code section] 1116, et seq[.], to any suspected child abuse report completed pursuant to [Penal Code section] 11166 related to

this case."[6] The date for the hearing on the applicability of Penal Code section 11166 was continued to October 14, 2014, and then continued to October 21, 2014, November 6, 2014, and finally November 25, 2014.

The reporter's transcript for the November 25, 2014 hearing includes the trial court's order that Jane Doe's counseling records would not be released without a protective order. The court set a hearing date of December 11, 2014, for further review and release of records, stating that "[t]he parties have found no authorities dealing with the [section] 11166 Penal Code confidentiality provisions. So I'll make my ruling at that time. But I'm inclined to produce the records I have redacted, as stated before, subject to an appropriate protective order."

D. *Writ Proceedings*

The People filed a petition for a writ of mandate in this court on December 4, 2014, shortly before the December 11, 2014, hearing for further review and release of the counseling records. The People sought a peremptory writ of mandate directing the trial court to vacate its order for release of Jane Doe's mental health records to and enter a new order granting the motion to quash defendant's subpoena duces tecum. The People also requested a temporary stay of trial court proceedings pending this court's writ review.

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[6] Section 11167, subdivision (d)(1) provides in part: "The identity of all persons who report under this article shall be confidential and disclosed only among agencies receiving or investigating mandated reports, to the prosecutor in a criminal prosecution . . . ."

Section 11167.5, subdivision (a) provides in part: "The reports required by Sections 11166 and 11166.2, or authorized by Section 11166.05, and child abuse or neglect investigative reports that result in a summary report being filed with the Department of Justice pursuant to subdivision (a) of Section 11169 shall be confidential and may be disclosed only as provided in subdivision (b)."

On December 9, 2014, this court issued an order staying all trial court proceedings until further order of this court. This court also gave defendant, as the real party in interest, the opportunity to file preliminary opposition to the petition for writ of mandate and allowed the People to file a reply.

On June 11, 2015, this court issued an order to show cause why a peremptory writ should not issue as requested in the petition for a writ of mandate and a temporary stay of all trial court proceedings while the writ petition was pending.

Defendant notified us, in a letter dated July 21, 2015, that he had elected not to file a return to the writ petition and would instead rely upon his preliminary opposition. Having received further briefing from the People and having provided an opportunity for oral argument, we turn to the merits of the writ petition, beginning with our standard of review.

IV. DISCUSSION

A. *Availability of Writ Review and the Standard of Review*

The California Supreme Court has instructed that "[a]s a general rule, the People may not seek an extraordinary writ in circumstances where the Legislature has not provided for an appeal. [Citations.]" (*People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1008.) However, our high court has also "long held that 'pretrial discovery orders in criminal cases may, in certain instances, be reviewed by prohibition or mandate.' [Citation.]" (*People v. Mena* (2012) 54 Cal.4th 146, 153-154 (*Mena*); see also *People v. Superior Court (Barrett*) (2000) 80 Cal.App.4th 1305, 1309 [People's writ petition granted where trial court improperly ordered district attorney to produce Department of Corrections records].)

Where a defendant's motion for discovery has been granted, section 1512, subdivision (a) provides statutory authority for writ review: "In addition to petitions for a writ of mandate, prohibition, or review which the people are authorized to file pursuant to any other statute or pursuant to any court decision, the people may also seek review of an

order granting a defendant's motion for . . . discovery by a petition for a writ of mandate or prohibition."

Additionally, this court has ruled in a criminal case that writ review is appropriate when the petitioner seeks relief from a discovery order that may undermine a privilege, " 'because appellate remedies are not adequate once the privileged information has been disclosed.' [Citations.]" (*People v. Superior Court (Mouchaourab*) (2000) 78 Cal.App.4th 403, 413 (*Mouchaourab*); see also *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336 [prerogative writs are available where a discovery order allegedly violates a privilege].)

In this case, we find that the trial court's order for pretrial disclosure of a portion of Jane Doe's Catholic Charities counseling records constitutes a discovery order for disclosure of records that, as we will discuss, defendant concedes are protected by the psychotherapist-patient privilege. (Evid. Code, §§ 1010, 1014.) We therefore determine that the People may appropriately seek writ review of the order. (See *Mouchaourab*, *supra*, 78 Cal.App.4th at p. 413.)

The standard of review for a discovery order is abuse of discretion. (*Mouchaourab*, *supra*, 78 Cal.App.4th at p. 413.) " 'Abuse of discretion' has been defined as follows: ' "The discretion intended . . . is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' [Citations.]" (*Ibid*.)

B. *Timeliness*

As a threshold matter, Arias contends that the writ petition should be denied as untimely filed more than 60 days after the trial court's September 25, 2014 order directing disclosure of certain portions of Jane Doe's counseling records. Arias relies on the decision in *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107

Cal.App.3d 496, which states: "An appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay. [Citations.]" (*Id*. at p. 499.) Thus, where, as here, "there is no statutory time limit on filing a writ petition, a 60-day period usually is imposed. [Citation.]" (*People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, 1562.)

The People respond that the operative date for triggering the 60-day period is November 25, 2014, the date that the trial court ruled that section 11166 would not apply to prevent release of Jane Doe's counseling records, and therefore the writ petition was timely filed less than 60 days later, on December 4, 2014. We agree.

Although the trial court ruled on September 25, 2014, after conducting an in camera review, that the court would disclose specific redacted pages of Jane Doe's counseling records, that ruling was preliminary to further court action. The court expressly ordered the redacted counseling records would be disclosed only after an appropriate protective order was signed, and set an October 2014 hearing date to review the protective order. The October 2014 hearing on the protective order did not take place because the trial court postponed the October 2014 hearing in order to consider the application of the section 11166 confidentiality provisions for mandated suspected child abuse reports. The date for the hearing on the applicability of section 11166 was ultimately continued to November 25, 2014, at which time the trial court determined that section 11166 did not apply and stated that the court was "inclined to produce the records I have redacted, as stated before, subject to an appropriate protective order." The court then set a a hearing date of December 11, 2014, "for further review and release of the records."

Thus, by the time of the November 25, 2014 hearing, no protective order had been filed and the trial court had set a December 11, 2014 date for possible disclosure of the

redacted portions of Jane Doe's counseling records as provided by the preliminary September 25, 2014 order. Under these circumstances, we determine that the People's writ petition filed on December 4, 2014, was timely filed.

Having determined that the People may properly seek writ relief from the trial court's order for disclosure of Jane Doe's counseling records, we turn to an overview of the rules governing the use of a third party subpoena duces tecum in a criminal case, followed by an overview of the psychotherapist-patient privilege.

C. *Subpoena of Third Party Records*

"Under Penal Code section 1326, subdivision (c), a person or entity responding to a third party subpoena duces tecum in a criminal case must deliver the subject materials to the clerk of court so that the court can hold a hearing to determine whether the requesting party is entitled to receive them. When, as here, the defendant is the requesting party, the court may conduct that hearing in camera. (Pen. Code, § 1326, subd. (c).)"[7] (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1071 (*Kling*).) However, "if the custodian of records objects to disclosure of the information sought, the party seeking the information must make a plausible justification or a good cause showing of need therefor." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.)

The defendant's third party subpoena duces tecum may be subject to the People's motion to quash. "Discovery proceedings involving third parties can have significant

[7] Section 1326, subdivision (c) provides: "In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court may not order the documents disclosed to the prosecution except as required by Section 1054.3."

consequences for a criminal prosecution, consequences that may prejudice the People's ability even to proceed to trial. For example, a third party's refusal to produce documents requested by the defense can potentially result in sanctions being applied against the People. [Citations.] . . . The People, even if not the target of the discovery, also generally have the right to file a motion to quash 'so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object' [citation] or is otherwise unable to do so. [Citation.]" (*Kling*, *supra*, 50 Cal.4th at p. 1078; see also *Hammon*, *supra*, 15 Cal.4th at p. 1120 [prosecutor asked trial court to quash pretrial subpoenas directed to psychologists based on the alleged victim's assertion of the psychotherapist-patient privilege].)

D. *Psychotherapist-Patient Privilege*

The psychotherapist-patient privilege is codified at Evidence Code section 1014, which provides in part: "[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: [¶] (a) The holder of the privilege. [¶] (b) A person who is authorized to claim the privilege by the holder of the privilege."

"The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. (Cal. Const., art. I, § 1; [citations].)" (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) As this court has noted, "[a]t the time Evidence Code section 1014 was enacted . . . , it was observed: ' "Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life . . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he [or she] will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends." [Citation.]' [Citations.] Therefore, because 'an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy' [citations], the 'privilege has

been broadly construed in favor of the patient.' [Citations.]" (*Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 445-446, fn. omitted.)

"Evidence Code section 1012, in turn, defines ' "confidential communication between patient and psychotherapist" ' to mean 'information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence . . . .' " (*People v. Gonzales* (2013) 56 Cal.4th 353, 371.)

Accordingly, the California Supreme Court has stated that an eight-year-old victim of alleged sexual abuse has a "considerable statutory and constitutional interest in the privacy of her communications with her therapist . . . . [Citations.]" (*People v. Superior Court (Humberto S.*) (2008) 43 Cal.4th 737, 753; see also *People v. Webb* (1993) 6 Cal.4th 494, 518 [strong public policy protects a patient's history of psychotherapy treatment].)

E. *Analysis*

In this case, the People argue that the trial court erred in denying the motion to quash and ordering pretrial disclosure of Jane Doe's Catholic Charities counseling records because, under the California Supreme Court's decisions in *Hammon, supra,* 15 Cal.4th 1117and *Gurule*, *supra*, 28 Cal.4th 557, the victim's privileged psychotherapy records should not be disclosed prior to trial.

Arias does not dispute the People's contention that Jane Doe's counseling records are protected by the psychotherapist-patient privilege (Evid. Code, § 1014). He argues, however, that the trial court properly determined that his due process right to a fair trial requires pretrial disclosure of Jane Doe's privileged counseling records for the purposes of trial preparation and presentation.

Our resolution of the issue raised in the instant writ petition—whether the trial court abused its discretion in ordering pretrial disclosure of a portion of Jane Doe's

privileged counseling records—is governed by the California Supreme Court's decisions in *Hammon, supra*, 15 Cal.4th 1117 and *Gurule*, *supra*, 28 Cal.4th 557.

1. *Hammon*

In our Supreme Court's decision in *Hammon*, the defendant was charged with committing lewd and lascivious acts on his foster child when she was under the age of 14. (*Hammon*, *supra*, 15 Cal.4th at p. 1119.) Before trial, the defendant issued subpoenas duces tecum to three psychologists who had treated the victim. The People moved to quash the subpoenas based on the victim's assertion of the psychotherapist-patient privilege. (*Id.* at p. 1120.) In opposition to the motion to quash, the defendant argued "that information about [her] psychological history was necessary in order to challenge her credibility on cross-examination," including " 'her propensity to fantasize and imagine events that never occurred.' " (*Ibid*.)

The trial court in *Hammon* quashed the subpoenas, finding that the defendant had not made a showing of good cause for an in camera review of the records. In so ruling, the trial court stated that defendant had " 'fail[ed] to identify any particular information which would be of benefit to the defendant. It is not adequate to simply contend that "all psychological records will provide evidence of the existence or nonexistence of said molestations" or "are necessary to prove the victim's lack of credibility, her propensity to fantasize and imagine events that never occurred." Such a holding would essentially result in an " 'in camera' " hearing in any case where the complaining witness had received psychiatric/psychological counseling.' " (*Hammon*, *supra*, 15 Cal.4th at p. 1121.)

On review from the Court of Appeal's decision affirming the trial court's order, our Supreme Court in *Hammon* addressed the issue of whether the trial court had erred by refusing to review the psychologists' records in camera before trial. (*Hammon*, *supra*, 15 Cal.4th at p. 1122.) The court began its analysis by disapproving the decision in

People v. Reber (1986) 177 Cal.App.3d 523 (*Reber*), which the court summarized as follows.

"The defendants in *Reber* were charged with kidnapping and committing various sexual assaults upon two victims, one developmentally handicapped and the other mentally ill. The defendants, who claimed the victims had hallucinated the assaults, sought to obtain the victims' psychotherapeutic records by subpoena duces tecum. Counsel asserted the records would show that both victims had histories of mental illness and severe delusions. The trial court quashed the subpoenas on the basis of the psychotherapist-patient privilege; the Court of Appeal reversed. '[A]dherence to a statutory privilege of confidentiality,' the court wrote, 'must give way to pretrial access when it would deprive a defendant of the constitutional right of confrontation and cross-examination.' [Citation.] To protect the right of confrontation, the court concluded, the trial court should have '(1) obtain [ed] and examine[d] in camera all the materials under subpoena, (2) weigh[ed] defendants' constitutionally based claim of need against the statutory privilege invoked by the People, (3) determine[d] which privileged matters, if any, were essential to the vindication of defendants' rights of confrontation and (4) create[ed] a record adequate to review its ruling.' [Citation.] [¶] To support the proposition that a defendant's need for information can outweigh the psychotherapist-patient privilege, the court in *Reber* [citation] relied on *Davis v. Alaska* [(1974)] 415 U.S. 308 (*Davis*). In *Davis*, which addressed trial rights, the United States Supreme Court held that a criminal defendant's right to confront adverse witnesses sometimes requires the witness to answer questions that call for information protected by state-created evidentiary privileges." (*Hammon*, *supra*, 15 Cal.4th at pp. 1123-1124.)

Our Supreme Court in *Hammon* ruled that "[t]he decision in *Davis* did not compel the *Reber* court's conclusions about the effect of the confrontation clause on *pretrial* discovery." (*Hammon*, *supra*, 15 Cal.4th at p. 1124.) The court explained that "[b]y its terms, the decision in *Davis*, *supra*, 415 U.S. 308, involved a defendant's *trial rights*

only: The court held a defendant could not be prevented at trial from cross-examining for bias a crucial witness for the prosecution, even though the question called for information made confidential by state law. In extending *Davis* to apply to pretrial rights, the court in *People v. Reber*, *supra*, 177 Cal.App.3d 523, appears to have assumed that a defendant might obtain before trial any information he would be able under *Davis* to obtain at trial. That assumption, however, is called into question in light of the United States Supreme Court's decision in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 (*Ritchie*), which was handed down shortly after *Reber*, *supra*, 177 Cal.App.3d 523." (*Hammon, supra*, at p. 1124.)

In *Ritchie*, the defendant was charged with sexually assaulting his 13-year-old daughter, who had reported the assaults to the Pennsylvania child protective services agency. (*Ritchie, supra*, 480 U.S. at p. 43.) During pretrial discovery, the defendant served a subpoena seeking the agency's records pertaining to his daughter, but the agency refused to comply. (*Ibid.*) The United States Supreme Court ruled that the defendant was entitled to have the agency's file "reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." (*Id*. at p. 58.)

The *Hammon* court distinguished *Ritchie*, stating: "Applying the rule of *Brady v. Maryland* (1963) 373 U.S. 83, 87, which generally requires the prosecution to turn over to the defense all material exculpatory information *in the government's possession*, the court in *Ritchie* held that under the circumstances of that case due process principles required the trial court to review the agency records in camera to determine whether disclosure was required." (*Hammon*, *supra*, 15 Cal.4th at p. 1125; see *Ritchie*, *supra*, 480 U.S. at p. 57.)

The *Hammon* court also observed that *Ritchie* did not decide the issue of whether the Sixth Amendment conferred the right to pretrial discovery: "In addition to raising a Fourteenth Amendment due process claim under *Brady v. Maryland*, *supra*, 373 U.S. 83,

the defendant in *Ritchie*, *supra*, 480 U.S. 39, argued that the compulsory process and confrontation clauses of the Sixth Amendment conferred a right to discover, before trial, information necessary to make cross-examination effective. The high court, however, left these questions undecided . . . ." (*Hammon*, *supra*, 15 Cal.4th at p. 1125; see also *People v. Clark* (2011) 52 Cal.4th 856, 982-983 [unclear whether confrontation or compulsory process clauses grant pretrial discovery rights]; *People v. Abel* (2012) 53 Cal.4th 891, 931 [same]; *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn. 10 [same].)

The *Hammon* court therefore declined the defendant's request that the court "hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial." (*Hammon*, *supra*, 15 Cal.4th at p. 1127.) The court stated: "We do not . . . see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.] *Before trial*, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Ibid.*, italics added.)

Additionally, the *Hammon* court noted that "the defense may issue subpoenas duces tecum to private persons is implicit in statutory law (Pen. Code, §[§] 1326, 1327) and has been clearly recognized by the courts for at least two decades. [Citations.] However, this more general right provides no basis for overriding a statutory and constitutional privilege." (*Hammon*, *supra*, 15 Cal.4th at p. 1128.)

The *Hammon* court accordingly concluded that "the trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers. We reject defendant's

claim that pretrial access to such information was necessary to vindicate his federal constitutional rights to confront and cross-examine the complaining witness at trial *or to receive a fair trial.*" (*Hammon, supra,* 15 Cal.4th at p. 1119, italics added.)

2. *Gurule*

The California Supreme Court reaffirmed its holding in *Hammon* in *Gurule, supra,* 28 Cal.4th 557, a capital murder case. In *Gurule*, the defendant sought pretrial discovery of the psychiatric records of the primary witness against him. (*Gurule, supra,* at p. 587.) The witness had been examined by psychiatrists after he voluntarily inculpated himself in an unsolved murder. (*Ibid*.) The witness objected to the disclosure of his psychiatric records to the defendant on the ground that the records were privileged under the psychotherapist-patient privilege (Evid. Code, § 1014) and the attorney-client privilege (*id.*, § 954) because he had hired the psychiatrists as expert witnesses in his own murder case. (*Gurule, supra,* at pp. 587-588.) The trial court examined the records that were protected only by the psychotherapist-patient privilege and, relying on the decision in *Reber, supra,* 177 Cal.App.3d 523, disclosed a portion of the psychiatric records, finding that the defendant's right to a fair trial and his need to impeach the primary witness outweighed the psychiatrist-patient privilege. (*Gurule, supra,* at p. 592.)

On automatic appeal, the defendant in *Gurule* contended that the trial court's denial of full access to the witness's psychiatric records had violated his rights to confront the witnesses against him (U.S. Const., 6th & 14th Amends). (*Gurule, supra,* 28 Cal.4th at p. 591.) The California Supreme Court stated: "Of course, the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question. [Citations.]" (*Id*. at pp. 591-592.) However, noting that *Reber* had been disapproved in *Hammon*, the *Gurule* court further stated: "Under *Hammon, supra,* 15 Cal.4th 1117, *psychiatric material is*

generally undiscoverable prior to trial. Defendant, then, received more discovery than he was legally entitled to . . . ." (*Gurule, supra,* at p. 592, italics added.)

3. The Motion to Quash Should Be Granted

The California Supreme Court determined in *Hammon* and *Gurule* that there is no constitutional requirement that the trial court either conduct a pretrial in camera review or allow pretrial discovery of the records of third party psychotherapy providers. (*Hammon*, *supra*, 15 Cal.4th at p. 1119; *Gurule*, *supra*, 28 Cal.4th at p. 592.) As an intermediate court, we are bound to apply the law as interpreted by our Supreme Court in *Hammon* and *Gurule*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

In the present case, defendant contends that *Hammon* is legally distinguishable and does not preclude disclosure of Jane Doe's counseling records. According to defendant, *Hammon* is "expressly limited" to its ruling that the Sixth Amendment right to confrontation does not extend to the pretrial discovery of privileged psychiatric information. Defendant therefore argues that the trial court properly determined that his due process right to a fair trial, including preparation and presentation of his case, required pretrial disclosure of Jane Doe's counseling records.

Defendant also contends that *Hammon* is factually distinguishable because *Hammon*, unlike the present case, did not involve records documenting the victim's initial disclosure, "which implicates issues such as the use of leading questions, suggestive interrogatories, positive feedback, and other recognized improper investigative techniques."

We are not convinced by defendant's argument that the decision in *Hammon* does not apply because he seeks pretrial disclosure of Jane Doe's privileged third party counseling records pursuant to his due process right to prepare for trial, rather than his Sixth Amendment right to confrontation. We observe that defendant has not provided

any authority for his argument other than the United States Supreme Court's decisions in *Ritchie* and *Davis*, which are unavailing.

In *Ritchie*, as we have discussed, the high court ruled that the defendant's right to due process required the trial court to review in camera the records of the Pennsylvania child protective service agency that the defendant had subpoenaed during pretrial discovery in his child molestation case, for the purpose of determining whether disclosure of exculpatory evidence was required under *Brady*. (*Ritchie*, *supra*, 480 U.S. at pp. 59-60.) In so ruling, the high court stated: " 'There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.' " (*Ritchie*, *supra*, at pp. 59-60; see *Mena*, *supra*, 54 Cal.4th at p. 160 [same].) Thus, *Ritchie* does not stand for the proposition that a defendant has a due process right to pretrial in camera review and disclosure of privileged psychotherapy records subpoenaed from a third party for the purpose of trial preparation. (See *Hammon*, *supra*, 15 Cal.4th at p. 1125.)

The *Davis* decision is also distinguishable, since that case involved only a defendant's trial rights. (See *Hammon*, *supra*, 15 Cal.4th at pp. 1123-1124.) The United States Supreme Court ruled in *Davis* that the confrontation clause (U.S. Const., 6th Amend.) was "paramount to the State's policy of protecting a juvenile offender," and therefore the defendant could impeach the credibility of a juvenile witness "by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent. . . ." (*Davis*, *supra*, 415 U.S. at p. 320.) Thus, no issue of pretrial discovery of privileged psychotherapy records was addressed in *Davis*. (See *Hammon*, *supra*, 15 Cal.4th at p. 1124.)

Guided by the California Supreme Court's decisions in *Hammon* and *Gurule*, we determine that defendant has not demonstrated that, under the circumstances of this case, he has a constitutional right to pretrial discovery of Jane Doe's counseling records that outweighs the psychotherapist-patient privilege. In the proceedings below, defendant argued that pretrial disclosure of Jane Doe's counseling records was necessary for his

investigation of the issues of adolescent memory and suggestibility and the mental and emotional state of the Jane Doe. In essence, defendant argued that his defense theory—that Jane Doe lacks credibility because she fabricated her allegations of child molestation with the aid of the Catholic Charities counseling intern—may be supported by pretrial disclosure of information in Jane Doe's counseling records. As we have discussed, a similar argument was rejected in *Hammon*.

The defendant in *Hammon* sought pretrial disclosure of the minor victim's psychotherapy records on the ground that the records would show that the victim had fabricated the allegations of child molestation due to her propensity to fantasize. (*Hammon, supra,* 15 Cal.4th at p. 1127.) The *Hammon* court rejected the defendant's contention that pretrial disclosure of the victim's psychotherapy records "was necessary to vindicate his federal constitutional rights . . . *to receive a fair trial.*" (*Id*. at p. 1119, italics added.) The *Hammon* court also declined "to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial." (*Id.* at p. 1127.)

Pursuant to the holding in *Hammon,* we determine that defendant has not demonstrated that his due process right to a fair trial requires pretrial discovery of Jane Doe's privileged counseling records for the purpose of investigating a defense theory that she fabricated the allegations of child molestation. We also emphasize that our Supreme Court in *Gurule* stated that "psychiatric material is generally undiscoverable prior to trial." (*Gurule, supra,* 28 Cal.4th at p. 592; see *Auto Equity, supra*, 57 Cal.2d at p. 455.) For these reasons, we conclude that the trial court should have granted the People's motion to quash the subpoena duces tecum to Catholic Charities for Jane Doe's counseling records.

Having reached that conclusion, we need not address the People's contention that Marsy's Law (Cal. Const., Art. I, § 28 subd. (b)(4)) bars pretrial discovery of Jane Doe's Catholic Charities counseling records. Our decision in the instant writ proceeding is

without prejudice to reissuance of the subpoena duces tecum at the time of trial. We emphasize that we express no opinion regarding the merits of any further trial court proceedings that may take place at the time of trial with regard to the disclosure of Jane Doe's Catholic Charities counseling records or the application of Marsy's Law.

V. DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to (1) vacate the order of September 19, 2014, denying the People's motion to quash subpoena duces tecum; (2) vacate the order of September 25, 2014, for disclosure of Jane Doe's Catholic Charities counseling records; and (3) enter a new order granting the People's motion to quash subpoena duces tecum. Upon finality of this decision, the temporary stay order is vacated.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.

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